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October 5, 1998

VIA FACSIMILE & FEDERAL EXPRESS

Ms. Marjorie Emmons
Secretary of the Commission
Federal Election Commission
999 East Street
Washington, DC 20463

**RE: MUR-4719 -- New Jersey Republican State Committee;
H. George Buckwald, as Treasurer (Respondents)**

Dear Ms. Emmons:

Respondents, New Jersey Republican State Committee and H. George Buckwald ("RSC"), submit this letter brief in response to the General Counsel's August 27, 1998 correspondence alleging that there is a reason to believe that the RSC used impermissible ratios to allocate administrative and generic voter drive expenses for shared federal and nonfederal activities in 1996. The facts support RSC's good faith in its submissions to the Federal Election Commission (the "Commission") and, in such instances, the Commission has allowed a transfer of balances within 30 days to reflect the proper ratio.

In preparing Schedule H-1 for the 1996 election, RSC took one nonfederal allocation point for each of the offices of State Senate and State Assemblyperson. According to the Certification of Charlene Hooker, previously submitted to the Commission, the RSC submitted Schedule H-1 with

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its letter requesting that the Federal Election Commission contact the RSC in the event of any questions regarding the allocation framework. The RSC spoke with the Commission and was given advice. At the time of allocation (January 24, 1996), Charlene Hooker, Director of Operations at RSC, corresponded with Kenneth A. Davis and requested that he review and comment on the allocation methodology. It did not seem that a formal advisory opinion was necessary, nor was the RSC advised by the Commission's employee to seek such a formal opinion on what was ostensibly a bookkeeping question. The Statute relating to advisory opinions, 2 U.S.C. 437(a)(1) states:

any person may request in writing an advisory opinion concerning the application of the [Federal Election Campaign] Act...or any regulation prescribed by the Commission...

This Statute does not mandate that any time a candidate or a political party has a question regarding the manner in which allocations are to be reported that that entity request a formal advisory opinion.

In the case at bar, it is the RSC's good faith belief that it was entitled to allocation of one point for the 8th District Senate seat to replace deceased Senator Haines and one point for the 21st District Assembly seat to replace the deceased Assemblyman Lustbader. This good faith belief was buttressed by the RSC's conversation and correspondence with the Commission.

The gravamen of the Complaint hinges on the interpretation of points assessed to races for non-federal offices for allocation purposes under 11 C.F.R. §106.5(d)(1)(ii). In pertinent part, this regulation states:

The committee shall count the non-federal offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each.

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The Complainant has incorrectly cited this to support the proposition that an allocation point can be allowed for the office of State Senator only if all the offices are up for election.

This is not so. The entitlement to a non-federal point is not predicated upon vacancies in all of the relevant legislative offices. One vacancy in one office at a specific legislative level is sufficient.

Pursuant to 11 C.F.R. §106.5(a)(1), political committees that maintain separate accounts for federal and non-federal activity must comply with the applicable allocation rules. Because certain party committees benefit both state and federal candidates, allocating expenditures ensures that the benefit received by candidates is reported accurately and paid with contributions that conform to federal law.

The purpose of the allocation regulations is to ensure that money that does not meet FECA restrictions is not used to influence Federal elections. AO-1991-15 at p.2.

The specific direction in this area is as follows:

In calculating a ballot composition ratio, a state or local party committee shall count the federal offices of President, United States Senator, and United States Representative, if expected on the ballot in the next general election, as one federal office each. The committee shall count the non-federal offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each.

AO-1993-17 at p.2.

In the case at bar, RSC was entitled to allocation of one point for the 8th District Senate seat to replace deceased Senator Haines and one point for the 21st District Assembly set to please the deceased Assemblyman Lustbader.

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Clearly, the vacancies left by both State Senator Haines and Assemblyman Lustbader entitled RSC to take an additional point for each office. The Commission's prior interpretations of the purpose of 11 C.F.R. §601.5 allow a wider discretionary latitude in this regard.

In AO-1991-25, the Commission reviewed a point allocation under 11 C.F.R. §106.5(d)(1)(i) for a special election held in conjunction with the November, 1991 general election. The death of United States Senator Heinz caused a vacancy in the U.S. Senate seat from Pennsylvania and the point allocation was addressed by the Commission:

The vacancy for U.S. Senate in Pennsylvania, however, did not exist until April 4, 1991; and it is scheduled to be filled before the November, 1992 general election. It is only the period between April 4 and the date of the special election held to fill this vacancy that will be affected by a change in the ballot composition ratio.

AO-1991-25 at p.2. The Commission then concluded that the State Committee's should add an additional Federal point to the ballot composition ratio "for that period only, making the Federal portion 44%." Ibid.

This issue was also addressed by the Commission in A.O.-1991-6 when due to special circumstances both California United States Senate seats were up for election in 1992. In the usual course of events, only one United States seat at a time would be up for election. Addressing the special circumstance,

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The Commission therefore conclude[d] that CDP must include a point for each U.S. Senate seat on the November 1992 general election ballot in its calculation of the Federal portion of its ballot composition ratio.

AO-1991-6 at p.4.

I. The Federal Election Commission Is Barred By Estoppel From Assessing Any Violation Since The Republican State Committee Requested Advice And Was Never Informed Of Any Impropriety With The Point Allocation

As noted, the RSC spoke with the Commission about its proposed point allocation plan and was not informed that its framework was in error. The RSC relied upon the Commission's advice. After neglecting to inform the RSC that there was any impropriety, the Commission cannot now assess a violation. Any such assessment is barred by the doctrine of equitable estoppel.

In principle, the doctrine of estoppel states that when one party leads another to do a thing which otherwise he or she would not have done, the former party shall not subject the other to loss or injury by disappointing the expectations acted upon. See generally New England Fish Co. v. Western Pioneer, Inc., 509 F.Supp. 865 (D.C. Wash. 1981). Here, the RSC asked a simple bookkeeping question and was not told that its point allocation was inappropriate. The result is that the RSC made its allocation then with the assumption that it was in compliance.

Generally, to establish estoppel, a false representation or concealment of material facts must be made, by a person with knowledge, actual or constructive, of real facts, to a person without such knowledge, with the intention that it shall be acted upon by the latter person and he

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must so rely and act thereon that he will suffer injury or prejudice by the repudiation or contradiction thereof. Di Napoli v. Exxon Corp., 549 F.Supp. 449 (D.C. N.J. 1982).

The RSC believes that the vacancies left by both State Senator Haines and Assemblyman Lustbader entitled it to take an additional point for each office. As set forth in the RSC's November 5, 1997 submission, the Commission's prior interpretations of the purpose of 11 C.F.R. §601.5 allow a wide discretionary latitude in this regard.

II. The Regulation Regarding Allocation of Expenses Is So Ambiguous And Convolved, It Is Unconstitutional

The "ballot composition method" as set forth at 11 C.F.R. §106.5(d) is convoluted. Where a statute or regulation is "not susceptible to objective definition," the United States Supreme Court has held that such statute or regulation could "give rise to the danger of arbitrary and discriminatory application" and should be found "void for vagueness". See e.g. National Endowment for the Arts v. Finley, ___ U.S. ___, 118 S.Ct. 2168, 141 L.Ed. 2d 500 (1998). It cannot be universally administered in each of the fifty states because some states, such as New Jersey, hold federal and non-federal elections in different years. According to 11 C.F.R. §106.5(g)(1)(i), state party committees that have established separate federal and non-federal accounts must pay the entire amount of an allocable expense from its federal account and shall transfer funds from the non-federal to the federal account to cover the non-federal share of allocable expenses.

The Commission has interpreted this regulation broadly as illustrated herein. A strict interpretation here would substantially deprive the RSC of its property rights in the use of its funds.

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The Fifth and Fourteenth Amendments protect against deprivations of property without constitutionally adequate due process procedures. See e.g., Sabet v. Eastern Virginia Medical Authority, 275 F.2d 126 (4th Cir. 1985).

When a law or a regulation is unclear, its enforcement can operate to deprive an individual or an entity of its due process rights since its vagueness does not allow a proper recognition of rights and responsibilities. If a regulation is arbitrary and irrational, it violates an entities right to substantive due process. Barancik v. County of Marion, 872 F.2d 834 (9th Cir. 1988), cert. denied, ___ U.S. ___, 110 S.Ct. 242, 107 L.Ed. 2d 193 (1989).

Here, the regulation is unclear. Its lack of clarity creates confusion even for the Commission whose Advisory opinions differ in interpretation. The Commission's General Counsel's brief at page 8 contemplates the use of an "average ballot" approach which is not discussed in the regulation or the explanatory opinions.

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The Commission therefore conclude[d] that CDP must include a point for each U.S. Senate seat on the November 1992 general election ballot in its calculation of the Federal portion of its ballot composition ratio.

A.O.-1991-6 at p.4.

If the Commission determines that the RSC has committed an error in its reporting, the error was based on a logical, good faith belief that the reporting was indeed proper. In reviewing the single isolated reporting error of using an unexpected refund from a vendor to repay a candidate for loans the Commission held:

The Committee's one reporting error is understandable and should be forgiven. The Commission should take this opportunity to demonstrate that it protects not only the politically sophisticated, but also those who make a good faith effort to follow its regulations.

A.O.-1997-21.

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CONCLUSION

Respondents respectfully request the Commission dismiss this Complaint with prejudice for two reasons: first, the ballot composition ratio was calculated correctly; and secondly, even if this allocation was in error, RSC had given notice to a representative of the Commission and requested that he respond if there were any problems. In instances where the miscalculation was made in good faith, the Commission has allowed a transfer of balances between accounts within 30 days to reflect the proper ratio. See A.O.-1991-15, A.O.-1983-22.

Dated: October 5, 1998

BY:

Dorothy A Harbeck

Dorothy A. Harbeck